

ARBITRATION CLAUSES DESERVE ATTENTION

We spend a great deal of time and money negotiating and documenting the important agreements relating to the ownership and operation of our hotels, especially management contracts and franchise agreements. Yet it is surprising how little thought is given to how disputes will get resolved under the arbitration clauses found in many of these agreements.

An arbitration clause is a provision in a contract that provides that the parties must submit certain disputes to arbitration. The arbitration will occur before a lone arbitrator or three arbitrators. The parties usually will submit a legal memorandum of their positions before the arbitration hearing. At the hearing, the arbitrator will hear testimony and review documents submitted by the parties. The matter being arbitrated will usually be resolved more quickly and less expensively than if the parties had their dispute resolved in court.

Arbitration has become a favored avenue for resolving commercial disputes in many industries, including the hotel industry. In some hotel franchise agreements, any dispute is required to be submitted to arbitration. In typical management agreements, if every dispute is not required to be submitted to arbitration, many of the most important ones are, such as whether the hotel is being operated to applicable standards, whether an incentive fee is calculated properly and whether budgets are appropriate.

In most hotel agreements, arbitration clauses are simple provisions that only set forth the types of disputes subject to arbitration, the agency to provide the arbitrators and rules of arbitration and the number of arbitrators to resolve the dispute. Considering the great importance of arbitration in these agreements, much greater thought should be given to these clauses.

There are four main reasons why arbitration clauses are so important.

First, arbitration clauses usually provide that the arbitrator's ruling is binding on the parties. Thus, absent unusual circumstances (such as fraud in entering into the arbitration clause), the parties to the agreement must use arbitration to resolve their dispute and cannot resort to the courts, except to ensure that the arbitration was properly conducted. In other words, no judge, no jury.

Second, arbitrators are not required to follow the law unless the arbitration agreement says they must (and most do not). In fact, a court of law usually cannot overturn an arbitration decision because the arbitrator made a mistake of law. As a result, the arbitrator can decide an issue based on his own sense of fairness.

Third, there is no right to discovery (such as depositions, document requests, interrogatories and requests to admit) in an arbitration proceeding absent an agreement to the contrary or arbitrator's decision to allow discovery. As a result, parties must present their positions to the arbitrator without the benefit of discovering documents or testimony that may help them.

Lastly and perhaps most importantly, the arbitrators are unlikely to have any experience in the hotel industry other than having stayed at a hotel. Although the same can be said about a judge hearing your case, a court case will invariably take longer to be resolved than an arbitration and provide greater opportunity to educate the judge through various legal pleadings filed before trial. The same is not true of an arbitrator, who may only have brief legal submissions provided to him before the arbitration and will be learning about most of the facts at

the hearing itself. Thus, your dispute may be resolved by an arbitrator who lacks knowledge of the industry and who is not bound to follow the law in a proceeding in which you have no discovery rights.

At a minimum, it makes sense that arbitration clauses in your hotel contracts require that one of the arbitrators have experience in the hotel industry, or, better yet, designate that the arbitrator be provided by a group such as the International Society of Hospitality Consultants, in conjunction with the Institute of Conflict Management. That way, at least the person(s) deciding the dispute will have the knowledge and experience to resolve the dispute appropriately.

David M. Neff (david.neff@dlapiper.com), a member of the International Society of Hospitality Consultants, is a partner at DLA Piper Rudnick Gray Cary US LLP and co-chair of the firm's Lodging and Timeshare Practice Group.